

CHAPTER 5.

CASH SALES, SELLER FINANCING, RETAIL INSTALLMENT CONTRACTS AND REPOSSESSIONS

***CAVEAT:** Financing matters are regulated by the Office of the Consumer Credit Commission (OCCC) who licenses and promulgates rules for seller-financing. This section is meant as a primer and not necessarily updated as to the latest requirements of that agency. Dealers who have specific questions regarding financing are urged to contact the OCCC at 512-936-7600 or www.occc.state.tx.us for more details and further information.*

5.1 Cash Sales. There is no separate definition of a cash sale in the Finance Code. A retail installment transaction, discussed in more detail below, is defined as a transaction in which one or more payments are due after delivery of either the vehicle **OR** the contract. By inference from that definition, a cash sale is any sale in which the dealer collects every dime of the purchase price, including TT & L, before delivery of the vehicle or the contract.

5.2 Requiring a Second Payment Negates a Cash Sale. Some dealers believe that if the buyer pays cash for the vehicle, and then pays the TTL in a second payment later, the transaction is still a cash sale. This is not true. Anytime a second payment is required after delivery of a vehicle, the transaction is a retail installment transaction which requires a retail installment contract. If you collect the TTL at a later date, the only way to avoid a retail installment contract is not to deliver the vehicle until you have received all payments.

5.3 Cash Sales Required Documents. The Finance Code does not contain special requirements for documenting cash sales. The Transportation Code and agency rules require dealers to keep a copy of all documents in the sales transaction whether cash or credit, including among others, the sales contract or purchase order, Buyer's Guide signed by the consumer, copies of the front and back of the title, and the title application receipt or document indicating that the consumer was taking the vehicle to be titled outside of Texas. There are no required terms or phrases that must be included in a cash sales contract, although as a matter of general contract law, the contract should accurately identify the vehicle being purchased and the price for the purchase. If the dealer contracts for other services such as certain repairs, the contract must state the terms specifically and clearly. Failure to specify the terms in a manner which the consumer can understand could lead to lawsuits for fraud or breach of contract.

5.4 Cash or Financed Requirements. Some requirements remain the same whether the sale is a cash deal or financed.

- a. Do not require a customer to sign anything with blanks to be completed later and do not add or alter any information in the contract after the customer has signed and been given a copy.
- b. Give the customer copies of all documents the buyer signed at the time the vehicle is delivered. Please note that if you give a copy of the contract before all payments have been collected, the transaction must be stated on a retail installment contract.

5.5 Definition of Retail Installment Transaction. The Finance Code states that every transaction in which one or more payments – including tax, title and license fees – are due after the vehicle **OR** the contract is delivered to the consumer is a retail installment transaction, which requires a written Retail Installment Contract. All sales in which one or more payments are due after the vehicle is delivered **MUST** use a written Retail Installment Contract. The Retail Installment Contract informs the buyer of the terms of the agreement, including the amount of the installments and the date on which they are to be paid. Federal and state law both require that certain specific pieces of information have to be disclosed to the consumer in the Retail Installment Contract. **FAILURE TO INCLUDE ANY REQUIRED ELEMENT MAKES THE CONTRACT ILLEGAL, AND SUBJECTS THE DEALER TO SERIOUS PENALTIES.** Blank forms containing the required elements may be purchased from local printers who advertise in motor vehicle dealer trade magazines or a dealer may contact a local dealer association for the nearest printer.

5.6 Seller-finance License Required. If a dealer wishes to finance his own sales, the first step he must take is to apply for a license with the Office of the Consumer Credit Commissioner. This has been required of all dealers who finance sales since September 1, 2002. Any information presented here is very basic and given only as a courtesy. A dealer who wishes to provide financing should contact the OCCC BEFORE conducting any financed transactions.

5.7 Elements of a Retail Installment Transaction. The following are some specific elements of a retail installment transaction. This is not a complete discussion and is provided only as a general guide. If you intend to start financing sales, please contact the OCCC or seek advice from an attorney with experience in this area first. Again, please note that credit transactions are heavily regulated by both the state and federal governments and there are many traps for the unwary in this area.

- a. Required Terms. The Retail Installment Contract must be in writing and contain certain terms. The standard forms available from printers or software will all include spaces for the following information:
 - 1. The date on which the contract was signed

2. Signatures of both buyer and seller
3. Full names of both buyer and seller
4. Seller's business address
5. Buyer's address
6. Description of the vehicle, including vehicle identification number
7. The cash price
8. "Notice to Buyer" statement required by law
9. Amount financed through the loan
10. Total sale price, including down payment
11. Finance charge
12. Annual Percentage Rate (APR)
13. Payment schedule – number, amount, and due date of payments
14. Total of payments – the total amount of money when all payments have been made over the life of the contract.

b. Specific Terms. Certain terms listed above have special meanings in retail installment transactions.

1. *Cash Price* – The price the buyer would pay if she didn't want to finance the transaction. It includes payment for everything purchased but the finance charge.
2. *Itemized Charges* – TT & L, inspection fees, insurance, service contracts, and other items purchased. It can also include accessories added to the vehicle by the dealer, like window tinting.
3. *"Notice to Buyer"* is a notice required by the federal government containing certain language about consumer credit transactions.
4. *Documentary fee* – this is a separate charge many dealers assess for the preparation of the sales transaction documents. It may be no more than \$50, which is considerably more than your actual cost to do this. You might consider using the "doc fee" as a negotiating item with the buyer.
5. *Annual Percentage Rate (APR)*. The Annual Percentage Rate must be clearly stated on any retail installment contract. This is more than simple arithmetic. All but the most elementary of the many financing options require a computer program to determine APR. Good programs will also provide a version of a Retail Installment Contract that meets the requirements and fills in the blanks. Dealers who are not computer literate may wish to reconsider their interest in financing sales.

5.8 Bailment Contracts and "Spot" Deliveries. Dealers may sometimes attempt to deliver a vehicle to a consumer before the successful placement of financing with an outside source. This is acceptable only under very limited circumstances, and if done incorrectly, could subject the dealer to fines.

a. Spot Deliveries and Conditional Sales Contracts. This is the term used when a dealer allows the consumer to take the vehicle home after signing a

retail installment contract, but before the consumer has been approved for the loan. Dealers have the buyers fill out all the necessary papers hoping they can sell the paper as completed. A spot delivery is not legal unless the consumer has filled out a conditional sales contract (also called a bailment agreement) and it has been made very clear to the consumer that they may have to return and sign another contract with higher payments, higher interest, or larger down payment.

A conditional sales contract must incorporate the following required elements to be valid.

1. A clause that would allow the buyer to cancel the sales contract before credit is approved.
2. Provisions allowing the buyer to cancel with full refund and return of trade-in if financing is not approved in accordance with the terms described in the purchase order.
3. In case of cancellation, the buyer's liability is limited to a rental fee, excessive mileage charge and use if these items are set out in the contract.

A dealer may make a retail installment contract subject to a conditional sales agreement, but the dealer must be very careful not to extend the conditional sales contract over an unreasonable length of time. Because what is reasonable varies according to circumstances, it is wise to keep the limbo period between delivering the vehicle and determining financing as short as possible. Two weeks has been ruled reasonable; three months has been ruled unreasonable. We have included at the end of this chapter an acceptable form for the Conditional Sale and Delivery agreement.

Note that the Office of the Consumer Credit Commissioner maintains that a conditional sales contract is only valid if no retail installment contract has been signed. Once a retail installment contract has been signed, it supercedes the conditional sales contract and upon delivery of the vehicle, the transaction is complete. The dealer has no right to require changes to the contract once it is complete.

- b. Dehorsing.** In a similar practice known as dehorsing, the consumer has given the dealer a trade-in as part of the deal. If the consumer can't or won't agree to new terms, he or she will often demand to unwind the deal and take back the trade-in. The dealer then says the trade-in is already sold (whether it is or not) so that unwinding is not an option. The consumer has been dehorsed, so he or she is forced to come to some agreement with the dealer. The Enforcement Section treats this practice as fraud. It is wise to wait to sell a trade-in until after the customer has been approved for financing.

5.9 Maximum Finance Charges. The basic law regulating maximum finance charges was written in 1967, prior to the Federal Truth in Lending Laws (TILA). In 1967, it was normal to show what is called an add-on rate in a contract. An add-on rate is simply so many dollars per \$100 financed per year. The authorization for add-on rates is now found in §348.104 of the Finance Code.

The add-on rates based on the model year are:

1. \$7.50 per hundred for model year 2000, 1999 and 1998 new vehicle, plus new foreign.
2. \$10 per hundred per year for model year 1999 used; 1998 and 1997.
3. \$12.50 per hundred per year for model year 1996, 1995 and, plus foreign more than four years old.
4. \$15 per hundred per year for model year 1994 and older.

The rates shown above were developed for the period before computers because you could figure the finance charge by simple multiplication.

Before TILA the time price differential (TPD) rate for the example above would have been 12.5 percent, after TILA the disclosure rate changed to 26.58 percent.

5.10 Repossessions. Repossession is based on a contractual and legal right to take possession of a vehicle if the consumer does not meet certain conditions laid out in the Retail Installment Contract. The right of a dealer to repossess a motor vehicle is based on having a security interest in the vehicle.

- a. Creating a security interest.** The standard form Retail Installment Contract contains language that grants the dealer or lender a security interest in the vehicle being purchased. This is one very good reason to use the standard form contract. Without the language in the contract, there is no security interest and therefore no right to repossess the vehicle. The security interest is then perfected – which simply means ‘completed’ – as a lien on the vehicle when the dealer transfers title.

Even before the lien is perfected by transferring title, the dealer may repossess if the customer does not fulfill certain terms of the Retail Installment Contract. Once the lien is perfected, the world knows of the lien, and the dealer stands first in line if others attempt to take the vehicle for other debts. The first person to perfect a lien on an item has priority over other creditors of the purchaser. This creation of a first lien is important to a dealer to protect his interest and ability to recover the vehicle if the consumer defaults on the contract. Dealers who finance sales thus have another reason to transfer title and record their lien in a timely manner.

- b. Grounds for repossession.** The dealer's right to repossess a vehicle is based on his security interest and the terms that may trigger repossession as spelled out in the Retail Installment Contract. Typically, these terms require the buyer to make payments in a timely manner and to keep the vehicle insured.

Another basis for repossession is if the dealer has a good faith belief that the prospect of payment is impaired. This is a weak basis that depends on the facts of the situation. For instance, if the dealer learns the customer is about to leave the area because of a pending arrest warrant, the dealer can reasonably believe payment on the contract is unlikely and collection will become nearly impossible. Repossession would be warranted, unless it becomes evident that the debtor made arrangements for someone else to make payments while he is unavailable. If you think this remedy is warranted, seek legal advice BEFORE TAKING ANY OTHER ACTION. Wrongful repossession has serious consequences, including possible prosecution for theft.

- c. Retrieving the vehicle.** The law is clear that if a dealer has a right to repossess a vehicle and has not obtained a court order to do so, the right may be exercised only if there is no breach of the peace. Courts have established that repossession of a vehicle from certain locations is acceptable. In summary, a vehicle may be retaken from the customer's driveway, from a public street or other public location. Repossession may not be made if the vehicle is behind closed garage doors or a locked gate. Further, even if the repossession location is legal, if a customer objects to the repossession, especially in those cases where physical force is used, it is considered a breach of the peace. These limitations on a dealer's right to physically retake a vehicle also apply to an employee of the dealer or an independent contractor. A towing company, for instance, acting as the dealer's agent is subject to all the same requirements and limitations as the dealers.
- d. Right of redemption.** After the repossession of a vehicle, and at any time before the dealer disposes of the vehicle, the customer may redeem the vehicle by paying the dealer the balance due on the contract plus the costs of repossession. The dealer must notify the customer prior of the repossession and before the vehicle is sold of the customer's right to redeem the vehicle.
- e. Disposition of the vehicle.** The dealer may dispose of the vehicle (i.e. sell it again) in any commercially reasonable manner. This usually means the dealer retails or wholesales the vehicle at a reasonable price. After notice to the customer, the dealer may dispose of any personal property found in the vehicle not claimed by the customer. This may include tools, clothing or other articles found in the vehicle. If the items are installed or attached to the vehicle, such as a stereo, the items are considered part of the vehicle and are subject to disposition with the vehicle.

f. Disposition of proceeds. Once the repossessed vehicle is re-sold, the proceeds must be distributed in the following order:

1. to the expenses of repossession, including attorneys fees;
2. to the debt owed on the vehicle;
3. to the debt owed to anyone else who has a security interest in the vehicle, if notice of this interest is received before the distribution; and,
4. to the debtor if proceeds remain after the prior items are paid.

These strict requirements for financing sales and repossessing vehicles demonstrate the need for dealers to become properly educated before doing either. There are many, many legal traps that may be very costly to the uneducated dealer.